APPENDIX A.

(Filed Sep. 14, 1967, Carl W. Reuss, Clerk.)

Nos. 16,991, 16,992, 16,993, 16,994.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
James R. Hoffa,
Defendant-Appellant.
No. 16,991.

United States of America,
Plaintiff-Appellee,
vs.
Thomas Ewing Parks,
Defendant-Appellant.
No. 16,992.

United States of America,
Plaintiff-Appellee,
vs.
Larry Campbell,
Defendant-Appellant.
No. 16,993.

United States of America,
Plaintiff-Appellee,
vs.
Ewing King,
Defendant-Appellant.
No. 16,994.

Appeals From the United States District Court
For the Eastern District of Tennessee.

Decided September 14, 1967.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Weick, Chief Judge. These appeals are from an order of the District Court denying Appellants' third motion for a new trial. Like the second one, it was also based on alleged newly discovered evidence. The alleged newly discovered evidence does not relate to the guilt or innocence of Appellants. The motion was not filed until nearly eighteen months after their conviction and one month after we had affirmed. *United States v. Hoffa*, 349 F. 2d 20 (6th Cir. 1965), *aff'd* 385 U. S. 293 (1966), *rehearing denied* February 27, 1967, 386 U. S. 951 (1967).[1]

The third motion alleged misconduct on the part of jurors and United States Marshals who were attending them during their sequestration. In this respect the third motion was similar to the first one, although the allegations of misconduct were embellished to a much greater extent.

After filing the third motion in the District Court, Appellant Hoffa sought to disqualify from hearing the motion the Judge who had presided over his trial which had lasted for nearly two months. He filed an affidavit under Title 28, U. S. C., Section 144, alleging personal bias and prejudice. The Judge ruled that the affidavit was untimely and legally insufficient and ordered it stricken. Hoffa then filed a motion to disqualify him under Title 28, U. S. C., Section 455, which the Judge considered and denied. The other Appellants adopted Hoffa's third motion for a new trial and his affidavit of bias and prejudice and motion to disqualify. We will consider first the affidavit of bias and prejudice and the motion to disqualify.

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[1] On February 20, 1967 the Supreme Court denied Appellants' motion to vacate judgment, which alleged violation of their constitutional rights by the use of electronic devices. 386 U. S. 940.

There is also pending in this Court an appeal from an order of the District Court denying Appellants' fourth motion for a new trial on newly discovered evidence containing similar allegations.

Affidavit of Personal Bias and Prejudice Under Section 144.

The only factual support for this affidavit was furnished by the affidavit of a prostitute named Marie Monday, who stated that on two different occasions, "Some time late in January, 1964, or the early part of February, 1964, during the course of the trial of the Hoffa case," she met the presiding Judge at the hotel where the jury was sequestered, and that on the first occasion the Judge told her that he was in charge of the "Hoffa" trial and that "Hoffa was going to get what was coming to him this time and that he was going to see to it that he did." On the second occasion the judge is alleged to have told her, "Don't you worry, he [Hoffa] is going to be convicted" because he [the Judge] was "in charge of it."

The Judge in a written opinion held that the affidavit was insufficient on its face; that it was not timely filed; that it did not comply with the statutory requirement of a certificate of counsel; and that it was not authorized by the statute since it was the second such affidavit filed in the case, the statute permitting the filing of only one affidavit.

After passing upon the sufficiency of the affidavit of bias and prejudice, the Judge then categorically denied that he had ever made the statements set forth in the prostitute's affidavit, to anyone, including her. He denied that he had ever met her or had a conversation with her, and denied that he was in the hotel where the jury was sequestered, or even in the vicinity of it, at any time during the trial, and stated that he had purposely stayed away from the hotel. He denied that he held any bias or prejudice against any of the Appellants. He pointed out that he had directed a verdict of acquittal for defendant Hoffa on one of the counts of the indictment. The jury had also acquitted defendants Hoffa, Dorfman and Tweel on Count IV

of the indictment. The Judge stated that the prostitute's affidavit "is a complete and total fabrication and fraud" and that he would not "be deterred by such patent perjury from doing his duty. . . . Each defendant will continue to receive every right accorded to him under the law."

There can be no question but that the Court was required to pass upon the sufficiency of the affidavit of bias and prejudice. *Berger v. United States,* 255 U. S. 22, 32 (1920); *Refior v. Lansing Drop Forge Co.,* 124 F. 2d 440, 444 (6th Cir. 1942), *cert. denied,* 316 U. S. 671 (1942); *Shea v. United States,* 251 Fed. 433 (6th Cir. 1918), *cert. denied* 248 U. S. 581 (1918). The statute does not permit the Court to inquire into the truth of the facts alleged in the affidavit.

The Judge ought not to be precluded from answering the attack upon him which contained innuendoes concerning his conversations with a prostitute and made a mockery of the administration of justice in a United States Court.

Understandably, he did not want the scandalous allegations concerning him to remain unchallenged in the record. See *Cole v. Loew's, Inc.,* 76 F. Supp. 872, 877-8 (S. D. Cal. 1948). His answer did not exhibit bias or prejudice. In any event, his answer did not affect the validity of his ruling that the affidavit was legally insufficient.

The statute would seem to require affidavits of personal bias and prejudice to "be based upon facts antedating the trial, not those occurring during the trial," *Berger v. United States, supra* (page 34); *Ex Parte American Steel Barrel Co.,* 230 U. S. 35 (1913). Bias and prejudice occurring during the trial can be corrected on review by the Court of Appeals, *Knapp v. Kinsey,* 232 F. 2d 458 (6th Cir. 1956), *cert. denied* 352 U. S. 892 (1956). See also *Taylor v. United States,* 179 F. 2d 640 (9th Cir. 1950)

(affidavit not filed until defendant moved to vacate sentence, untimely); *Ex parte Glasgow,* 195 Fed. 780 (N. D. Ga. 1912), *aff'd sub nom. Glasgow v. Moyer,* 225 U. S. 420 (affidavit not filed until after motion in arrest of judgment and new trial, untimely). Nor was the statute

> ". . . intended to paralyze the action of a judge who heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. . . ."
>
> *Ex parte American Steel Barrel Co., supra,* at page 44.

But Appellants have additional hurdles to overcome. The statute required the filing of "a timely and sufficient affidavit," *Refior v. Lansing Drop Forge Co., supra.* It further provided that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

In his affidavit for disqualification, defendant Hoffa stated that he first learned of these matters on August 23, 1965, and could not have learned of them any sooner through the exercise of due diligence. This does not explain why it took nearly eighteen months to learn about events alleged to have taken place during the trial. The affidavit does not state what diligence, if any, was exercised to discover this information nor why it could not have been discovered sooner.

But it appeared from the first motion for a new trial filed on March 10, 1964, and the affidavits filed in support thereof, that Appellants alleged misconduct of Marshals and jurors; that the Marshals furnished large quantities of intoxicating liquors to the jurors and entertained them; and that Ezell Ervons, one of the porters at the hotel, arranged for a girl to visit a Marshal. A bellboy named

Culpepper signed an affidavit that he saw a lot of drinking going on on the tenth floor where the jurors were staying and that he saw some of the jurors standing around with drinks in their hands. Another bellboy named Ball mentioned drinking on the floor of the hotel where the jurors were staying.

In support of the third motion for a new trial, Appellants procured another affidavit from this same bellboy, Culpepper, which stated that during the trial on several occasions he called a girl named Marie and a girl named Bobbie, to come to the hotel, and that after each visit the girl would give him a tip. Marie is the prostitute Monday's given name.

Monday, in another affidavit which was filed in support of the third motion for a new trial, stated that she went to the hotel on numerous occasions during the trial and that on some of these occasions she saw Culpepper, Ball and Ervons.

Since Appellants knew of the bellboys and the porter in March, 1964, and had obtained affidavits from some of them relating to misconduct of Marshals and jurors, it would seem to us that the more scandalous material now alleged was then available and could have been obtained from the same bellboys and porter. Under these circumstances, we do not believe that the failure of the District Court to infer diligence was wrong, and in our judgment "good cause" for the delay was not established.

On its face, the affidavit of the prostitute Monday is vague and equivocal and leaves much to inference and conjecture. She does not state how or under what circumstances she happened to meet the Judge, nor the place in the hotel where the meeting is alleged to have taken place, nor who introduced her. She is hazy as to the time. Although she claims she met the Judge, she qualifies her

identification by stating that she knows he is the same person whom she saw on television and whose picture she had seen in a newspaper. One would certainly have to be most credulous to believe that a United States Judge, presiding over a criminal trial, would go to a hotel where the jury was sequestered, meet a prostitute under unexplained circumstances, and confide in her his feelings of bias and prejudice against one of the defendants. The District Judge, however, was precluded, as we are, from making inquiry into the truthfulness of the statements alleged in the affidavit. *Berger v. United States, supra.*

There are other defects in the affidavit. The statutory requirement as to a certificate of good faith of counsel was not complied with. The only counsel of record for defendant Hoffa, who was admitted to the bar of the Court, had withdrawn from the case and did not sign the certificate. The signature of James E. Haggerty, Sr., a Michigan lawyer who had not been admitted to the bar of the Court, appears thereon. Haggerty, by telegram, had authorized a Washington, D. C. lawyer, who was not an attorney of record or admitted to the bar of the Court, to affix his signature on all papers and documents in connection with the case. Harold E. Brown, who was attorney of record for Appellant King, requested that his name be entered as local counsel for Mr. Hoffa on the date the third motion for a new trial was filed, and he signed the certificate. He had been duly admitted to the bar of the District Court.

The certificate must be signed by an attorney who is a member of the bar of the Court. *Currin v. Nourse,* 74 F. 2d 273 (8th Cir. 1934), *cert. denied* 294 U. S. 729 (1935). The purpose is to shield a court which cannot test the truth of the facts alleged in the affidavit. The statute is not satisfied by having another lawyer, who did not represent the defendant during the trial, execute the certificate.

The statute further provided:

> "A party may file only one such affidavit in any case."

The affidavit involved here was the second such affidavit filed in this case by Appellant Hoffa. The first affidavit was filed against District Judge Frank Gray, Jr., who, after ruling that the affidavit was insufficient, voluntarily and contemporaneously recused himself.

It is contended that the statutory limitation of one affidavit should be construed so as to apply only to a case where the Judge rules that the affidavit is sufficient and he is disqualified thereby. But this is not what the statute says, and its language is clear and plain.

Here the affidavit of bias and prejudice filed against Judge Gray, although insufficient, accomplished its purpose, namely it got rid of the judge who was scheduled to hear the case, and secured another judge against whom appellants could and later did file a second affidavit of bias and prejudice after the case had been decided and reviewed by this Court.

The statute does not provide a remedy similar to habeas corpus or Title 28, Section 2255 proceedings, where successive petitions may be filed. In plain and unequivocal language the statute permits only one affidavit of bias and prejudice to be filed by a party in a case. *Martin v. Texas Indem. Ins. Co.*, 214 F. Supp. 477 (N. D. Tex. 1962), *cert. denied* 377 U. S. 971 (1964).

The District Judge did not err in refusing to recuse himself. Since the affidavit alleged personal bias and prejudice only with respect to the defendant Hoffa, the other appellants have no standing to question the ruling.

Motion to Disqualify Under Section 455.

The basis for this motion is that the District Judge, by answering the attack upon himself, in some manner became a material witness in the case and therefore was disqualified under Section 455 from passing upon the motion for a new trial.

The fact that the judge ruled adversely to Appellants on their Section 144 affidavit of bias and prejudice, provided no ground for the disqualification of him under Section 455. Appellants were granted a review of the Judge's ruling on their Section 144 affidavit, which we have found to be correct. No hearing was held in the District Court on the Section 144 affidavit as it was disposed of entirely on the basis of its insufficiency. Nor do we believe that an oral hearing was required on the third motion for a new trial, as we will point out later.

The Judge did not have a substantial interest (pecuniary) in the case, nor was he a material witness. See *United States v. Smith,* 337 F. 2d 49 (4th Cir. 1964), *cert. denied* 381 U. S. 916 (1965). There is an obligation upon a Judge not to recuse himself when there is no occasion. *In Re Union Leader Corp.,* 292 F. 2d 381 (1st Cir. 1961).

The Third Motion for a New Trial.

The misconduct alleged against the jurors and Marshals was that during the course of the trial, while the jurors were sequestered in a hotel, the Marshals furnished intoxicating beverages and other favors to them, and that they imbibed to excess and discussed the case among themselves and others, in violation of the Court's instructions, and made statements concerning the guilt of Appellants, and exhibited bias and prejudice against Appellants. It was alleged that two of the jurors, prior to the trial, had expressed opinions to fellow employees as to Mr. Hoffa's guilt and had made statements indicating

bias and prejudice against him and also against labor unions.

It was further alleged that the Marshals furnished prostitutes to seven of the jurors and that the jurors had intercourse with the prostitutes in their hotel rooms. It was alleged that the Marshals paid the prostitutes twenty dollars for each service, and had made remarks prejudicial to Appellants in the presence of the jurors. The purport of the motion was that the Marshals and jurors were engaged in the evenings at the hotel in wild, drunken orgies and parties with prostitutes and that at least seven of the jurors were immoral and biased persons unfit to serve as jurors.

The motion was accompanied by affidavits of four prostitutes, two bellboys who claimed to have acted as procurers, and six men who worked at the same plant as two of the jurors. Other affidavits were filed which relate to the time and circumstances under which the affidavits of the bellboys, prostitutes and fellow employees had been procured.

The Government filed counter-affidavits of all of the jurors and alternates (except one, who was critically ill) and of the Marshal and Deputy Marshals who assisted in the care and custody of the jury during the trial.

Each juror and alternate juror categorically denied that a Marshal had furnished him with intoxicating beverages or other favors; denied that a Marshal had furnished him with a prostitute; denied that he had intercourse with a prostitute; denied that he had discussed the case or made statements concerning the guilt of the Appellants or indicating bias or prejudice. Some of the jurors did admit taking a drink before the evening meal, but denied drinking to excess, and stated that they paid for their own drinks. All of the Marshals denied the charges of misconduct alleged in the affidavits.

The District Judge, in a comprehensive opinion, held that the motion on its face was legally insufficient because many of the acts of misconduct now claimed to be newly discovered, were asserted in the original motion for a new trial and there is no showing of any facts upon which diligence might be inferred.

Motions for a new trial on newly discovered evidence are not favored and should be granted only with great caution. *United States v. Costello,* 255 F. 2d 876 (2nd Cir. 1958), *cert. denied* 357 U. S. 937 (1958); *Weiss v. United States,* 122 F. 2d 675 (5th Cir. 1941), *cert. denied* 314 U. S. 687 (1941); *United States v. West,* 170 F. Supp. 200 (N. D. Ohio, 1959), *aff'd* 274 F. 2d 885 (6th Cir. 1960), *cert. denied sub nom. Haug v. United States,* 365 U. S. 811 (1961).

We have repeatedly held that the granting or refusing to grant such motions rests within the sound discretion of the District Court and its action must stand in the absence of a clear showing of abuse of discretion. *United States v. Crowder,* 351 F. 2d 101 (6th Cir. 1965); *United States v. Lewis,* 338 F. 2d 137 (6th Cir. 1964), *cert. denied* 380 U. S. 978 (1965); *United States v. Barnhill,* 305 F. 2d 164 (6th Cir. 1962), *cert. denied* 371 U. S. 865 (1962); *Ashe v. United States,* 288 F. 2d 725 (6th Cir. 1961); *Stern v. United States,* 260 F. 2d 365 (6th Cir. 1958); *Winer v. United States,* 228 F. 2d 944 (6th Cir. 1956), *cert. denied* 351 U. S. 906 (1956); *Sharp v. United States,* 195 F. 2d 997 (6th Cir. 1952).

In order to be entitled to a new trial on newly discovered evidence, it was incumbent on Appellants to establish that the evidence was newly discovered since the trial and facts must be alleged which infer diligence on the part of the mover. *United States v. West, supra,* 170 F. Supp. at page 208; *Wion v. United States,* 337 F. 2d 230 (10th Cir. 1964); *Ferina v. United States,* 302 F.

2d 95 (8th Cir. 1962), *cert. denied sub nom. Cardarella v. United States,* 371 U. S. 819 (1962); *Gallegos v. United States,* 295 F. 2d 879 (9th Cir. 1961), *cert. denied,* 368 U. S. 988 (1962).

We agree with the District Court that many of the alleged acts of misconduct now relied on were not "newly discovered" at all, but were alleged in support of the original motion for a new trial. These included the charges with respect to the Marshals' supplying jurors with intoxicating beverages, and drinking with and entertaining the jurors; that the jurors mingled with other people and considered matters not introduced in evidence; that jurors were discussing Hoffa, in the hallway; that a porter got a girl for a Marshal and let them use a room. These charges were all denied in counter-affidavits. The District Judge gave careful consideration to the charges in ruling on the original motion for a new trial. In so doing he took into account the appearance and demeanor of the jurors as he saw them each day during the trial, which lasted nearly two months, their attentiveness, and their verdict which acquitted some of the defendants and convicted others. He found the charges to be without foundation. We affirmed his findings, 349 F. 2d 20, 50, and certiorari was not applied for on this ground.

It also appeared from the record of that motion that sums of money were offered or given to bellboys to sign affidavits charging misconduct of Marshals and jurors. It further appeared that Mrs. Emolene Akers, a juror who had been charged with making prejudicial statements in Tennessee (after the verdict), was in Florida at that time.

The affidavits of the four prostitutes, however, were not before the District Judge when he ruled on the first motion for a new trial. But, as we pointed out in discussing the affidavit of bias and prejudice, the prostitutes were known to the bellboys who procured them. These

bellboys signed affidavits concerning misconduct of jurors and Marshals which were filed in support of the original motion for a new trial. With these leads available, no plausible explanation was given as to why appellant should not then have been able to secure from the prostitutes the same information which he obtained nearly eighteen months later. If such nightly revelry ever took place in the hotel with so many people involved, its notoriety would have been most difficult to conceal from the appellants and their alert attorneys and investigators. The defense did not overlook investigation of jurors and even employed an electronics expert to intercept FBI radio communications. See *United States v. Hoffa*, 349 U. S. 20, 39. Apparently no difficulty was experienced in "discovering" the misconduct after the judgment was affirmed.

The District Judge concluded from the record that diligence in procuring the information could not be inferred, and we agree.

We also agree with the trial Judge that diligence can not be inferred in procuring the information that two of the jurors had made statements prior to the trial indicating bias and prejudice.

But the trial Judge went further. He considered the affidavits and counteraffidavits and made findings of fact. It was unnecessary for him to do this since there was adequate basis for denying the motion on the ground of lack of diligence. He was apparently motivated by a desire to pass upon all of the issues. We will therefore review his findings.

The trial Judge found as a fact that no juror or alternate juror was at any time furnished a prostitute by any Marshal, nor did any juror have any contact with or engage in any conversation with any prostitute, including

the four named prostitutes; that no juror at any time prior to submission of the case discussed the case with anyone or expressed any opinion as to the guilt or innocence of any Appellant, or made any comment or expressed any prejudice against any Appellant, nor were any statements prejudicial to Appellants made by any third party in the presence of the jury, nor did any juror fail to fully and truthfully respond upon his respective voir dire examination; that no Marshal had made any remark prejudicial to any Appellant or in the presence of a juror; that no Marshal had provided any juror with alcoholic beverages or bestowed other gifts or favors upon any juror, or did anything calculated to influence any juror; that no unauthorized separation of the jury occurred during the trial of the case and at no time was any juror out of the presence of a Marshal; that the Marshals had at all times during their attendance upon the jury conducted themselves in accordance with the instruction of the Court.

The Court placed no credence upon the affidavits of the four prostitutes "who admit selling their bodies, if not their signatures, for immoral purposes for $20," nor did he believe the affidavits of the two who claimed they were procurers of the prostitutes, but who did not purport to identify any of the jurors, nor did he credit the affidavits of fellow employees of two jurors, pointing out that one of them, after giving an affidavit accusing a juror of perjury on his voir dire examination, had invited the same juror to a social affair at which alleged statements of jury misconduct were made by the juror.

In our opinion, these findings of fact are supported by substantial evidence and are not clearly erroneous. In denying the third motion, the District Judge did not abuse his discretion.

Were Appellants Entitled to an Oral Hearing, With Live Witnesses, on Their Charges of Juror and Marshal Misconduct?

This same point was raised in the direct appeal, where it was argued that Appellants were entitled to an oral hearing on their original motion for a new trial charging misconduct of jurors and Marshals. Affidavits in support of that motion were filed and the Government filed counteraffidavits. We held that the District Court did not abuse its discretion by denying the motion for a new trial without an oral hearing. Appellants did not seek certiorari on this issue and our ruling has become the law of the case.

Moreover, an oral hearing was not required to determine whether diligence was exercised in filing the third motion for a new trial, because lack of diligence was apparent on the face of the record.

Both first and third motions for a new trial alleged misconduct of jurors and Marshals of much the same nature. They both had their foundation in a common source of information, namely, the bellboys, which lead to the prostitutes and was available at the time the first motion was filed, nearly eighteen months prior to the third one.

Nor do we believe a District Court is required to conduct an oral hearing on a motion for a new trial in every case, no matter how outlandish, imaginative, and irresponsible the allegations might be.

It has long been settled that the District Court may hear a motion for a new trial on newly discovered evidence and decide it on affidavits. Where affidavits and counteraffidavits are filed, the Court may adopt findings of fact. This procedure was approved by the Supreme Court in *United States v. Johnson*, 327 U. S. 106 (1945).

In that case the Court of Appeals had set aside findings of fact of the District Court adopted upon consideration of affidavits and counteraffidavits, and reached a different conclusion on the facts. The Supreme Court reversed the Court of Appeals, holding that the District Court's findings of fact were supported by substantial evidence, and that Appellate Courts should "refrain from reviewing findings of fact which have evidence to support them", *id.* 113.

In *Johnson* the defense claimed that a Government witness had perjured himself and submitted affidavits to establish this fact. Counteraffidavits were filed by the Government. In that case the facts substantiating the allegations of perjury by the witness were, as almost always must be the case, outside the personal knowledge and observations of the trial judge. What the trial judge did see (and what the Supreme Court thought made him exceptionally qualified to pass on the motion without a hearing) was the demeanor of the witness on the stand while he was supposedly perjuring himself.

In our case the alleged improper conduct took place outside of the courtroom and the presence of the District Judge, but like the Judge in the *Johnson* case, he did see the jurors every day while they were supposedly repeatedly violating their oaths (as well as his frequent instructions as to their duties as jurors).

Thus the critical observations of the trial judges in *Johnson* and *Hoffa* were the same; they daily viewed closely people who were supposedly breaking their oaths as witnesses and jurors; neither judge had firsthand knowledge of the facts stated in the affidavit. The Judge in *Johnson* compared his knowledge of the witness' demeanor with the allegations of the motion for a new trial and concluded that the witness had not broken his oath;

the District Judge made a similar comparison in the present case when he ruled upon the first motion for a new trial. The observations which he then made, which are set forth at length in our opinion on the direct appeal, apply with equal force here. 349 F. 2d 20, at page 50.

We think *Johnson* is dispositive of this case and is binding upon us. We find no basis to distinguish it. We will not give credence to factual claims which the trial judge, on consideration of the affidavits in the light of his personal knowledge of what transpired at the trial, has found to be untruthful.

We followed *Johnson* in *United States v. Crowder,* 351 F. 2d 101 (6th Cir. 1965) and in *Stern v. United States,* 260 F. 2d 365 (6th Cir. 1958). Other Circuits have followed the same rule. *United States v. Astore,* 309 F. 2d 144 (2nd Cir. 1962); *United States v. Troche,* 213 F. 2d 401 (2nd Cir. 1954); *Ewing v. United States,* 135 F. 2d 633 (D. C. Cir. 1942), *cert. denied,* 318 U. S. 776 (1943). *Lyles v. United States,* 272 F. 2d 910 (5th Cir. 1959) recognized this rule but remanded for an oral hearing because the Government joined with the defense in requesting it.

This is not a case where a witness has recanted, or where the Government's witness has testified falsely, or where the Government has confessed error. Nor has any Marshal or juror reported any wrongdoing to the Court. *Cf., Remmer v. United States,* 347 U. S. 227 (1954). Furthermore, this is not a habeas corpus or Section 2255 proceeding, involving different statutory procedures.

In our opinion, the body of law which has developed in connection with motions for a new trial on newly discovered evidence has not been overturned or rendered obsolete by these statutory post-conviction procedures which are not before us. We apply the rule in *Johnson* and have no authority to overrule or limit it.

Our dissenting brother states that he will feel better if James Hoffa and his co-defendants are given no more but no less consideration than is obtainable by every person charged with crime. We believe that they have already been accorded such consideration. We are bound to apply the law as we find it regardless of the person involved.

The record here does not indicate any lack of concern or consideration by the courts of Appellants' claims. In these and related cases literally hundreds of legal questions have been raised. Hoffa's first motion for a new trial contained ninety different grounds. In appellants' direct appeal sixteen main questions were presented, which were divided into thirty-six parts. This is the third appellate review, and a fourth appeal is pending.

The Supreme Court has affirmed Hoffa's conviction. He was represented by a battery of able and experienced trial lawyers who overlooked nothing. He did not lack investigators.

The Courts are always open to hear as many proceedings as Hoffa and his co-defendants may desire to commence.

In a footnote the dissent alludes to the post-conviction proceedings of one Townsend, who was convicted of murder and sentenced to death, as showing the concern of today's courts for those who are charged with or convicted of crime. However, Townsend's various proceedings principally involved the question of whether his confession was voluntary, and they ultimately resulted in no gain for him except delay. When all of Townsend's efforts are compared with those of Hoffa, as above set forth, they appear to be minuscule.

The reliance in the dissent on the rule applicable to summary judgment in civil cases, is misplaced. No sum-

mary judgment was entered on the merits of this case. There was a protracted trial by jury. We do not agree that the carefully prepared and well reasoned opinion of the District Judge dealing with the troublesome problems raised in the third motion, constituted an easy dispatch of that motion. His procedure was fully authorized by *Johnson* and the other cases cited in his opinion.

The Government secured affidavits from the jurors in connection with the original motion for a new trial and again in resisting the third motion for a new trial. We think these contacts with the jurors are about enough. There is the countervailing consideration of protecting the jurors from inquisition, harassment and unnecessary embarrassment in a hearing. This consideration involves more than just the sensibilities of the individual jurors, but also the integrity of the judicial process. If defendants could so easily force jurors into lengthy and scandalous hearings, reputable members of the public would certainly be reluctant to serve.

The question of whether to determine the motion on affidavits or in a hearing, was within the discretion of the trial court. We find no abuse of discretion.

Affirmed.

O'Sullivan, Circuit Judge, dissenting in part.

I regret that I cannot fully agree with my brothers of the majority. I do not express a view that a new trial should be granted, but would remand the case to the District Judge for a hearing upon the issues raised by the affidavits supporting, and those opposing, the motion for new trial.[1]

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[1] I would not require any hearing on the charges made against the trial judge—one of our distinguished and able District Judges. The falsity of the charges made against him is, of course, within his personal knowledge.

Defendants file numerous affidavits describing conduct of jurors and United States Marshals which, if true, denied defendants their constitutional right to trial by jury. If the identified jurors and the marshals did half of what is charged to them, the Hoffa trial was, as far as they were concerned, an idle and frivolous ceremony; guilt of Hoffa and his co-defendants was assumed by some of them, and for nearly all of the male jurors the period of their sequestration provided the occasion and opportunity for revelry and illicit sexual indulgence. Neither the District Judge's opinion nor the government's address to us suggests that such conduct, if it actually took place, could be viewed otherwise than as depriving the defendants of a fair trial.

If the accusing affidavits are untrue, the filing of them constitutes brazen criminal activity—false swearing by the affiants (some eleven different deponents make up the company of possible false swearers) and the deliberate subornation of perjury by others. Their execution and the procuring of them, in such circumstances, would constitute as vicious and despicable an attempt to undermine the integrity of our entire court system as the original charges of jury tampering. But even though we may entertain personal belief that the mentioned affidavits of the prostitutes and others were perjured, we may not, in my view, approve a disposition of such serious charges solely upon the affidavit denials of the accused jurors and marshals. The very gravity of the situation forbids its easy dispatch.

While the District Judge discussed the question of the delay in making the involved motions and whether the allegations contained in the affidavits could properly be regarded as "newly discovered evidence," he went on to dispose of the motion as follows:

> ". . . the Court can and will however decide the factual issues raised by the present motion for new

trial on the basis of the affidavits and counter-affidavits filed herein. *The law is well settled that a motion for new trial based upon newly discovered evidence may be decided by the Court upon the affidavits and counter-affidavits filed in support and opposition to the motion.*" (Emphasis supplied.)

In affirming him, my colleagues say,

"It has long been settled that a Court may hear a motion for a new trial based on newly discovered evidence *and decide it on affidavits.* Where affidavits and counter-affidavits are filed, the Court may adopt findings of fact." (Emphasis supplied.)

I must respectfully disagree that there is such a broad rule properly applicable to the type of situation we deal with here. The opinions recited as supporting the rule relied upon, *United States v. Johnson,* 327 U. S. 106 (1946); *United States v. Astore,* 309 F. (2) 144 (C. A. 2, 1962); *Lyles v. United States,* 272 F. (2) 910 (C. A. 5, 1959); *Stern v. United States,* 260 F. (2) 365 (C. A. 6, 1958); *United States v. Troche,* 213 F. (2) 401 (C. A. 2, 1954); *Ewing v. United States,* 135 F. (2) 633 (C. A. D. C., 1942), *cert. den.* 318 U. S. 776; *Hillman v. United States,* 192 F. 264 (C. A. 9, 1911), *cert. den.* 225 U. S. 699; *United States v. Crowder,* 351 F. (2) 101 (C. A. 6, 1965), are not apposite in the context of this case. In the main, they are decisions where the newly discovered evidence consisted of post-trial declarations by individuals that testimony given by prosecution witnesses was perjured, evidence that would add to or corroborate defense testimony, or evidence by a prosecution witness recanting his trial testimony. Generally, the judge hearing the motion had seen and heard the witness whose trial testimony was challenged by the newly discovered evidence.

The opinion most cited for the claimed permissibility of resolving factual issues presented by a motion for new

trial upon affidavits is *United States v. Johnson,* 327 U. S. 106, *supra,* in which the factual issue presented was whether a prosecution witness had testified falsely. The charges of false swearing were made in affidavits supporting motions for new trial; opposing affidavits were filed by the government. The trial judge denied a first motion and his conduct was described by the Supreme Court as follows:

> "The trial judge in a carefully prepared opinion covering fifty-six pages of the record, gave thoughtful consideration to each affidavit, reached the conclusion that none of them showed that Goldstein had perjured himself, and found both from the new affidavits *and his own knowledge of the original six-weeks trial that Goldstein's testimony was true.* The motion for a new trial was consequently denied." 327 U. S. at 109. (Emphasis supplied.)

A second motion for new trial, based upon further newly discovered evidence, was also denied by the trial judge. In approving this conduct, the Supreme Court said,

> "The trial judge's findings *were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day.* Consequently, the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration." 327 U. S. at 112. (Emphasis supplied.)

The critical difference between *Johnson* and the case before us lies, as it does in the other cases relied upon by the majority, in the fact that the charged misconduct *there* involved—false testimony—occurred within the immediate view and attentive hearing of the trial judge. The judge

had also seen and heard the testimony of all of the witnesses sworn at the trial. This evidence was part of the material available to the trial judge in resolving the question of whether the accused witness had testified falsely. I do not read *Johnson* as holding that an issue of fact such as is presented by the competing affidavits filed in this case can be resolved solely by consideration of the affidavits.

In *United States v. Crowder, supra,* and in *Gordon v. United States,* 178 F. (2) 896 (C. A. 6, 1949), *cert. den.* 339 U. S. 935, we were presented with situations analogous to the *Johnson* case—situations in which witnesses had testified at trial in the presence of the District Judge, and later gave recanting affidavits—situations not involved in the case before us. We said in *Crowder:*

> "In this case the district judge heard Tucker's testimony before the jury . . . This same witness now has undertaken by affidavit to change his story. . . ." 351 F. (2) at 104.

And we quoted from *Lyles v. United States, supra,* that:

> "*Ordinarily,* the district court may in its discretion determine a motion for new trial upon affidavits without more. *Ewing v. United States,* 1942, 77 U. S. App. D. C. 14, 135 F. (2) 633, 638. There are, however, *exceptional cases* in which an oral hearing should be granted. . . ." *Id.* at 104, 105. (Emphasis supplied.)

But notwithstanding the above language, the Fifth Circuit in *Lyles* reversed the district judge, who had denied a motion for new trial solely on the basis of the affidavits, and remanded the matter for an evidentiary hearing. A reading of *Ewing v. United States,* 135 F. (2) 633 (C. A. D. C., 1942), *cert. den.* 318 U. S. 776, cited in *Lyles,* leaves uncertain the contents of the affidavits there, but again they dealt with conduct observed in open court. Without further analysis of the other opinions relied on for the

assertion that *in this case* it was proper to dispose of the motion solely upon the conflicting affidavits, my own study of them and their special facts persuades me that they do not support or announce the broad proposition of law relied on by the District Judge.

It should be noted that in disposing of an earlier motion for new trial charging misconduct by the jury, the District Judge took occasion to emphasize his own observations of the good conduct of the jury while in his presence, and his inquiries of the deputy marshals as to their proper care of the jurors. These observations were not included in his memorandum denying the motion here involved. But even had they been, that would not suffice: all of the misconduct now charged, if true, occurred *outside* of the courtroom and *outside* of the presence of the judge; the affidavits include statements that contrary to their responsibilities while they were sequestered, the jurors and marshals were in contact and communication with strangers to the case on trial. Prejudice to the defendants would be presumed if these events actually occurred. See *Mattox v. United States,* 146 U. S. 140, 148-50, 36 L. Ed. 917, 920, 921 (1892); *Remmer v. United States,* 347 U. S. 227, 229, 98 L. Ed. 654, 656 (1954); *Ryan v. United States,* 191 F. (2) 779, 780, 781 (C. A. D. C., 1951).

I find no decision which provides clear precedent for the stand I take. However, in *Wheaton v. United States,* 133 F. (2) 522 (C. A. 8, 1943) and in *Richardson v. United States,* 360 F. (2) 366 (C. A. 5, 1966), the respective courts of appeals remanded for evidentiary hearing, charges of improper communication with a juror, made in motions for new trial. I concede that their facts provide some distinctions from the matters before us. They do, though, emphasize the importance of taking testimony to resolve issues arising from claims of extraneous interference with a jury's consideration of a case. In remanding in *Richardson,* the Court said:

"The allegation of fact in the third ground of the motion that the witness Treherne engaged in a private conversation with one of the jurors must stand as confessed since no hearing was conducted. Prejudice will be assumed in the form of a rebuttable presumption [citations omitted]. In failing to conduct 'a thorough inquiry . . . to determine exactly what . . . occurred' before overruling the motion, the trial court abused its discretion." 360 F. (2) at 369.

Moreover, in numerous post-conviction applications for relief in habeas corpus and § 2255 matters, the United States Supreme Court has admonished repeatedly against disposing of factual assertions regarding constitutional wrongs without an evidentiary hearing. In *Walker v. Johnston,* 312 U. S. 275 (1941), the Court, dealing with a factual issue presented in a habeas corpus petition, said:

"On a hearing he [the defendant] would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. *The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.* On this record it is his right to be heard." 312 U. S. at 286-7. (Emphasis supplied.)

Such also is the rule of *Machibroda v. United States,* 368 U. S. 487, 495 (1962), which we followed in *Scott v. United*

States, 349 F. (2) 641, 643 (C. A. 6, 1965). To the same effect, see *Doyle v. United States,* 336 F. (2) 640, 641 (C. A. 9, 1964); *Wright v. Dickson,* 336 F. (2) 878, 882, 883 (C. A. 9, 1964); *Romero v. United States,* 327 F. (2) 711, 712 (C. A. 5, 1964); *Evans v. Eyman,* 363 F. (2) 540, 542 (C. A. 9, 1966); *Del Piano v. United States,* 362 F. (2) 931, 933 (C. A. 3, 1966). While these cases do not involve motions for new trial on newly discovered evidence, they expose the law's current and especial concern that claims of deprivation of constitutional rights be not summarily disposed of. In my view, it would be anomalous to have required an evidentiary hearing had the defendants chosen to present the identical charges now before us in a § 2255 petition, filed after they had been taken into custody, but to deny such a hearing on the present motion.[2]

Trial judges are not permitted to resolve issues of fact presented by opposing affidavits in summary judgment proceedings (*6 Moore's Federal Practice,* § 56.11 [3], p. 2163), and I am not aware of any other procedure which permits a trial judge to adjudicate essential and critical issues of fact solely upon his reading, and his own weighing of the relative probative worth, of conflicting affidavits.

Were my view to prevail, I would indeed share the regret of my colleagues and the District Judge that jurors be subjected to the annoyance, publicity and inconvenience that would be visited upon them by an evidentiary hearing. And I would regret the burden on the judiciary from repetitive efforts of one convicted of crime to escape the

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[2] Were charges of the kind here involved made in habeas corpus or in a Section 2255 petition, the subject of diligence, so emphasized by my brothers of the majority, would be irrelevant in determining whether a hearing should be had. I do not think that the form of presenting such type of charges gives reality to the distinction relied upon by the majority opinion; we are dealing here not with the traditional type of motion for new trial, but one which in all pertinent respects fits more closely into the context of a habeas corpus proceeding.

law's punishment.[3] But the law is patient and does not tire of examining into the question of fair trial. The now landmark case of *Townsend v. Sain*, 372 U. S. 293 (1963), involved the claim of unfair trial by one convicted of murder in the first degree. Townsend was convicted in 1955 and in the ensuing 12 years his charges of constitutional deprivation have been considered and reconsidered approximately 18 times by various levels of state and federal judicial authorities.[4] As of the last of the appellate decisions set out in footnote 4, Townsend's 1955 conviction was found to be without fault, but it is my understanding that application has since been made for further judicial scrutiny.

That I may entertain a personal belief that the spectacular story told by the affidavits produced by Hoffa and his co-defendants is pure fabrication and perjurious does not permit me to deny an evidentiary hearing. Such a hearing may indeed provide the best means of exposing and punishing a deliberate and sinister attempt to vitiate

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[3] The United States Courts, however, are not without potent weapons to discourage these impositions. Their awesome power to punish for contempt or perjury, if courageously employed, will provide needed deterrents.

[4] Townsend's conviction has been reviewed as follows: *conviction affirmed, People v. Townsend,* 11 Ill. (2) 30, 141 N. E. (2) 729 (1956), *cert. den., Townsend v. Illinois,* 355 U. S. 850 (1957); post-conviction relief *denied* in Illinois state trial and Supreme Courts, *cert. den., Townsend v. Illinois,* 358 U. S. 887 (1958); post-conviction relief in federal District Court *denied, appeal dismissed, U. S. ex rel. Townsend v. Sain,* 265 F. (2) 660 (C. A. 7, 1958), *rev'd and remanded, Townsend v. Sain,* 359 U. S. 64 (1959); petition *dismissed* in District Court, *aff'd U. S. ex rel. Townsend v. Sain,* 276 F. (2) 324 (C. A. 7, 1960), *cert. granted, Townsend v. Sain,* 365 U. S. 866 (1961), *rev'd and remanded, Townsend v. Sain,* 372 U. S. 293 (1963); decision of District Court ordering new trial *rev'd, U. S. ex rel. Townsend v. Ogilvie,* 334 F. (2) 837 (C. A. 7, 1964), *cert. den. Townsend v. Ogilvie,* 379 U. S. 984 (1965); motion to allow amendment of petition *denied* in District court, *aff'd, United States ex rel. Townsend v. Ogilvie,* 360 F. (2) 925 (C. A. 7, 1966), *cert. den., Townsend v. Ogilvie,* 385 U. S. 938 (1966).

a jury's verdict or, however unlikely, reveal a shocking disregard by the accused jurors and marshals assigned to safeguard them, of the solemn oaths they made and the responsibilities they accepted.

I will feel better if, when our processes have run their full course, it can be said that James Hoffa and his co-defendants were given no more, but no less, than the concern which today's courts exhibit for the constitutional rights of even the most vicious and obviously guilty felons. In *Sanders v. United States,* 373 U. S. 1 (1963), the United States Supreme Court took occasion to say,

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." 373 U. S. at p. 8.

In my opinion, a remand for an evidentiary hearing would not call for admission of the defendants to bail pending its completion. The initial impression of implausibility made by these extreme charges should preclude such action.

I would remand this matter to the District Court for an evidentiary hearing, limited, of course, to consideration of the charge of jury misconduct.

APPENDIX B.

(Filed Oct. 16, 1967, Carl W. Reuss, Clerk.)

Nos. 16,991, 16,992, 16,993, 16,994.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
James R. Hoffa,
Defendant-Appellant. } No. 16,991.

United States of America,
Plaintiff-Appellee,
vs.
Thomas Ewing Parks,
Defendant-Appellant. } No. 16,992.

United States of America,
Plaintiff-Appellee,
vs.
Larry Campbell,
Defendant-Appellant. } No. 16,993.

United States of America,
Plaintiff-Appellee,
vs.
Ewing King,
Defendant-Appellant. } No. 16,994.

Order Denying Petition for Rehearing.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

The argument of appellants now appears to focus on alleged bias and hostility of two jurors, expressed prior to the trial, and the claim of error of the District Judge in ruling on the affidavit of bias and prejudice filed against him. The petition for rehearing does not even mention the alleged misconduct of United States Marshals and seven jurors with prostitutes, which was featured in the appellants' brief in chief and which we thought was palpably incredible.

The petition for rehearing asserts that this court "failed to take into consideration the allegations of jury bias and hostility, as expressed by two members of the jury prior to trial and concealed by them during the voir dire examination." This assertion is incorrect as even a cursory examination of our opinion will show. We stated:

> "We also agree with the trial Judge that diligence cannot be inferred in procuring the information that two of the jurors had made statements prior to the trial indicating bias and prejudice.
>
> . . .
>
> "The trial Judge found as a fact . . . that no juror at any time prior to submission of the case discussed the case with anyone or expressed any opinion as to the guilt or innocence of any appellant, or made any comment or expressed any prejudice against any appellant. . . ."
>
> "[N]or did any juror fail to fully and truthfully respond upon his respective voir dire examination; . . . nor did he [the Judge] credit the affidavits of fellow employees of two jurors, pointing out that one of them, after giving an affidavit accusing a juror of perjury on his voir dire examination, had invited the same juror to a social affair at which alleged statements of jury misconduct were made by the juror.
>
> "In our opinion, these findings of fact are supported by substantial evidence and are not clearly

erroneous. In denying the third motion, the District Judge did not abuse his discretion."

The trial Judge had before him when he ruled on the third motion, the voir dire examination of these two jurors in which they swore under oath that they would decide the case solely on the evidence. He also had the sworn statements of the two jurors denying that they had expressed bias or hostility to any of the appellants. He had presided over a long trial and saw the jurors daily. He ruled on the first and second motions for a new trial on newly discovered evidence and the affidavits and counteraffidavits filed in connection therewith. He was certainly very familiar with all aspects of the case. With this experience, the Judge was "exceptionally qualified to pass upon the affidavits." *United States v. Johnson,* 327 U. S. 106, 112.

Moreover, the affidavits submitted by appellants concerning these two jurors indicate that their views with respect to Hoffa and labor unions were notorious. If this were so, that fact could easily have been ascertained when appellants investigated the veniremen prior to the trial to determine whether there was evidence of bias, prejudice or ill will toward any of the defendants (Main case Appendix, p. 455a). Under the circumstances, the Judge could not infer diligence in presenting the alleged newly discovered evidence nearly eighteen months after the conviction.

The claims made with respect to the affidavit of bias and prejudice are answered in our opinion and need not be repeated here.

The petition for rehearing is denied.

Judge O'Sullivan, although adhering to his dissent, concurs in the denial of the petition for rehearing.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX C.

Opinion—Filed Sept. 22, 1965.

The defendants were convicted on March 4, 1964, of willfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties, in violation of the Federal Obstruction of Justice Statute (18 U. S. C., Sec. 1503). Upon appeal the convictions were affirmed by the Court of Appeals by a unanimous opinion filed July 29, 1965. The case is now before this Court upon a motion for a new trial alleging newly discovered evidence and upon a motion filed by the defendant Hoffa, and subsequently joined by the other defendants, seeking to disqualify the undersigned as the presiding judge and alleging bias at the time of the trial. This motion to disqualify is based upon a purported affidavit obtained 18 months after the trial and within a few days after the United States Court of Appeals affirmed the conviction of the defendants. The affidavit purports to be that of a woman who identifies herself as one Marie Monday and who, in further affidavits in support of the motion for new trial, identifies her occupation as that of a prostitute who frequented the rooms of the jurors. The affidavit represents that someone who identified himself as the presiding judge in the trial of the defendant Hoffa, whom she now identifies as such, visited her at the Read House Hotel where the jury was quartered during the course of the trial in January and February 1964 and confided in her that he was biased against the defendant Hoffa.

The Government has filed a motion to strike the motion to disqualify.

The affidavit upon which the motion to disqualify is based is a complete and total fabrication and fraud. The facts are:

(1) The undersigned has never known nor ever been introduced to the person described in the purported affidavit as Marie Monday, nor has the undersigned ever had any conversation with such a person at *any* time or place about *any* subject, including *any* matter relating to the trial of James R. Hoffa or any defendant in this case.

(2) The undersigned was never in nor in the vicinity of the Read House Hotel, Chattanooga, Tennessee, during the entire course of the trial of the case of *United States of America v. James R. Hoffa et al.*, extending from January 20, 1964, through March 6, 1964, and including the date of sentencing upon March 12, 1964, having deliberately avoided going there for any purpose during the said trial in view of the fact that the jury trying the case was quartered and sequestered at the said hotel.

(3) The undersigned has never made the statement "that he was in charge of the Hoffa trial" or that "Hoffa was going to get what was coming to him this time and he was going to see to it that he did" or "don't you worry, he is going to be convicted because he (Wilson) was in charge of it," nor anything bearing any resemblance to such statements to *any* person at *any* time or in *any* place, including the person identified as Marie Monday, the place identified as the Read House Hotel, and the time identified as during the course of the trial of this case.

(4) The undersigned has never held any bias or prejudice nor acted as a result of any bias or prejudice against the defendant James R. Hoffa, nor against any defendant in this case, nor has he held any bias or acted as a result of any bias in favor of the prosecution. Each and every action of the Court is a matter of record in the case and was taken solely on the basis of the evidence and in accordance with the law, irrespective of the party or parties affected thereby. For example, this Court directed a verdict of acquittal for the defendant, James R. Hoffa,

at the conclusion of the evidence upon one count upon which the court deemed that the evidence was insufficient to submit to the jury. The record of the trial and each action of the court has now been carefully and fully reviewed by the United States Court of Appeals and found to be free of error.

The defendants contend, however, that the truth or falsity of the affidavits is irrelevant and cannot be asserted to defeat the motion to disqualify. As unusual as this may seem, this is a correct statement of the present law under 28 U. S. C. 144, upon which the motion to disqualify is based.

This statute provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

In the case of *Berger v. United States,* 255 U. S. 22, 65 L. Ed. 481, 41 S. Ct. 230, with three justices dissenting, the Court held that under the language of the foregoing section, upon the filing of an affidavit of personal bias or prejudice against a judge, the truth or falsity of the facts asserted cannot be passed upon but that, regardless

of whether the judge is in fact biased or prejudiced, he must assume the facts as stated in the affidavit to be true and pass only upon the legal sufficiency of the affidavit and motion. See also *Taylor v. United States,* 179 F. 2d 640; *Refior v. Lansing Drop Forge Company,* 124 F. 2d 440.

However, even though the falsity of an affidavit is not permitted to be asserted as a basis for denying the motion to disqualify, and even though the fact of bias is not required to exist, the statute makes other requirements before a judge is to be declared disqualified. One of these requirements is that "a party may file only one such affidavit in any case." In this case the defendant, James R. Hoffa, filed such an affidavit against Judge Frank Gray under date of December 10, 1963. Although Judge Gray held the affidavit legally insufficient to require his disqualification, he nevertheless withdrew from the case. It was as a consequence of the withdrawal of Judge Gray following the filing of the affidavit against him that the undersigned was designated to try the case. Having heretofore filed one such affidavit, in accordance with the express provisions of the statute, the defendant is not permitted to file a second against another judge. Otherwise, the defendant could file successive motions and affidavits to disqualify each judge designated to try the case and thereby prevent any disposition of his case.

As stated in the case of *Allen v. duPont,* 75 F. Supp. 546 at page 549:

> "If the affidavit filed in this case is to prevail, conceivably every judge in the federal system might in monotonous succession be given the same sort of passport and our judicial procedure be rightly made the subject of ridicule and contempt."

See also *United States v. Buck,* 23 F. Supp. 508, and *Martin v. Texas Indemnity Insurance Co.,* 214 F. Supp. 477. As stated by the Court in the latter case at page 480:

"28 U. S. C. A., Section 144, imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here."

In the second place, the statute requires that the affidavit be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." In the present case the motion was filed, as mentioned above, 18 months after the trial of the case and within a few days after the conviction of the defendant had been affirmed upon appeal.

In the case of *Ex Parte American Steel Barrel Co.*, 230 U. S. 35, 57 L. Ed. 1379, 33 S. Ct. 1007, the Court held that Section 21 of the Judicial Code (the forerunner of the present Section 144) "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than 10 days before the beginning of the term."

This was reaffirmed in the case of *Berger v. United States*, 255 U. S. 22, 65 L. Ed. 481, 41 S. Ct. 230, and the following language:

"The section permits only the affidavit of a party and *Ex Parte American Steel Barrel Co., supra,* decides that it must be based upon facts antedating the trial, not those occurring during the trial."

See also *Knapp v. Kinsey* (C. C. A. 6, 1956), 232 F. 2d 458, wherein the Court held that Section 144, Title 28

U. S. C., is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial.

In the case of *Ex Parte Glasgow,* 195 F. 780, the Court held that Section 21 of the Judicial Code (the forerunner of Section 144) did not authorize an affidavit to disqualify a judge from ruling on motions in arrest and for new trial. See also *Taylor v. United States* (C. C. A. 9, 1950), 179 F. 2d 640, wherein the Court held that an affidavit of bias and prejudice filed in the district court on a motion to set aside judgment and sentence would not be timely.

In this case there is a total lack of showing of any facts upon which diligence might be inferred. The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any prior time. That the existence of prostitutes as a source of affidavits had occurred to the defendants at a much earlier stage in these proceedings is shown in the affidavits upon the original motion for a new trial wherein deputy marshals were charged with misconduct.

A further defect in the motion to disqualify is the failure of the motion to be accompanied by a proper certificate of good faith executed by counsel of record. In this the Court is not referring to the issue of fact that may exist as to the truth or falsity of the certify of good faith, although the existence of an issue of fact upon the certificate has never been ruled upon by the appellate courts. (*Berger v. United States,* supra, was limited to the non-contestability of the affidavit of bias.) Rather, the Court is referring to the fact that counsel of record for the defendant Hoffa upon the trial of this case was Attorney Harry Berke, and that Mr. Berke has not joined in the certificate of good faith on behalf of the defendant Hoffa stating his belief in the truth of the affidavit of

Marie Monday. James Haggerty, Sr., an attorney of Detroit, Michigan, has filed the certificate of good faith along with Harold E. Brown, an attorney of Chattanooga, Tennessee. Mr. Haggerty is not a member of the bar of this Court. Mr. Brown, while a member of the bar of this Court, was not an attorney of record for the defendant Hoffa upon the trial of the case, but rather was the attorney of record for the defendant King. The omission of the certificate of good faith upon the part of counsel of record for the defendant Hoffa at the time of the trial is a significant omission.

The requirement that local counsel of record in the trial of the case execute the certificate of good faith is not a technical one. Rather, it is a matter of substance. Counsel not admitted to practice in this Court but appearing only specially in one case for one defendant, is obviously not subject to the same restraint as an attorney who regularly practices before the Court and would not be as liable to use the care and restraint of an attorney regularly practicing in the Court. The present case is a classic example of this fact. Mr. Haggerty has filed a telegram in which he authorizes an attorney in Washington, D. C., who has never been an attorney of record in this case, as follows:

> "You Are Hereby Authorized to Affix My Signature on All Papers and Documents in Connection With the Case of the United States Versus James R. Hoffa et al. in the United States District Court in Chattanooga, Tennessee."

Even in this electronic era, practice by wire has yet to be fully accepted by the Courts as a substitute for personal presence.

As with counsel not admitted, likewise so it is with counsel, who, though admitted to practice in this court was not counsel of record at the time of the trial but who

rather was hired specifically to file the certificate of good faith. It is obvious that such counsel will not be in position to make as meaningful a certificate of good faith as would counsel of record in the trial and further would not be as likely to use the care and restraint in certifying good faith as would otherwise be the case were his employment not directly related to the filing of the certificate, and that only.

In the case of *Currin v. Nourse* (C. C. A. 8, 1934), 74 F. 2d 273 at page 275, the Court stated: ". . . The section of the applicable statute (section 21, Judicial Code, title 26, USCA, Sec. 25) provides that 'no such affidavit [an affidavit of bias and prejudice] shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.' The phrase 'counsel of record' in the statute means an attorney at law admitted to the bar in the case. One who is not a member of the bar cannot be counsel of record even though the record on its face may show he had undertaken to appear as counsel. Since Mr. Payne was not on the date of the filing of either of the affidavits a member of the bar of the court, he could not then or at any earlier time have been counsel of record in the case for either of the affiants. The purpose of the provision of the statute requiring certificate of good faith by counsel of record is that the court may be assured that the affidavit is made in good faith through the certificate to that effect made by one who is a sworn officer of the court, regularly admitted as an attorney to practice at the bar of the court. The requirement is not technical.

It is one of the essential requirements of the statute. As the affidavits were not certified to be made in good faith by counsel of record, the motions to strike them for insufficiency in law were properly sustained and Judge Otis 'having,' as he stated, 'no consciousness whatever of any

prejudice against any of the parties or in favor of any,' the duty to continue with the hearing in the matter of confirmation of the sale remained upon Judge Otis. *Klose v. United States* (C. C. A. 8), 49 F. (2d) 177; *Cuddy v. Otis* (C. C. A. 8), 33 F. (2d) 577; *Morse v. Lewis* (C. C. A. 4), 54 F. (2d) 1027; *Saunders v. Piggly Wiggly Corp.* (D. C.), 1 F. (2d) 582; *Benedict v. Seiberling* (D. C.), 17 F. (2d) 831; *Ex Parte Fairbank Company* (D. C.), 194 F. 978."

See also the cases of *Mitchell v. United States,* 126 F. 2d 550, at page 552; *Beland v. United States,* 117 F. 2d 958, at page 960; *United States v. Garden Homes, Inc.,* 113 F. Supp. 415, at page 418; *United States v. Onan,* 190 F. 2d 1, at page 6; and *Freed v. Inland Empire Insurance Co.,* 174 F. Supp. 458, which stand for the proposition that the requirement of the statute is founded on the assumption that a member of the bar will not indulge in reckless disregard of the truth and therefore attest to the good faith and belief of affiant and that one may not be counsel of record unless a member of the bar of the Court before which appearance is made.

Counsel of record has an obligation to the Court as well as to his client, and a public duty to aid the administration of justice, to uphold the dignity of the Court and respect its authority.

United States v. Gilboy, 162 F. Supp. 384; *United States v. Onan,* 190 F. 2d 1; *Bishop v. United States,* 16 F. 2d 410.

With respect to the Motions and affidavits filed upon behalf of each of the defendants other than defendant Hoffa, there is no allegation of any bias or prejudice personal to any defendant other than defendant Hoffa. The affidavits of bias filed on behalf of the defendants Campbell, Parks, and King merely adopt by reference the affi-

davit of Marie Monday filed in the Hoffa Motion. These affidavits do not purport to set forth any alleged remarks of the Court with respect to these three defendants. The statute requires that the affidavit of bias show that the Judge "has a personal bias or prejudice either against him or in favor of any adverse party." The affidavits here involved do not specify any bias or prejudice of this Court personal to the defendants Campbell, Parks, and King, even when the affidavits are held to be incontestable for falsity. As stated by the Court in *Price v. Johnson,* 125 F. 2d 806, at 811:

> ". . . The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against suitor making the affidavit or in favor of his opponent.' "

See also *Knapp v. Kinsey* (C. C. A. 6, 1956), 232 F. 2d 458, at 466; *Hurd v. Letts,* 152 F. 2d 121; *Eisler v. United States,* 170 F. 2d 273, at page 278; *Johnson v. United States,* 35 F. 2d 355; and *United States v. Gilboy,* 162 F. Supp. 384.

Finally, although since this Court is the object of the attempted defamation here sought to be practiced, it does not cast its opinion denying the motion to disqualify upon this ground, the law is well settled that the affidavit of bias and prejudice must be sufficient to fairly convince a sane and reasonable mind that such attitudes on the part of the attacked judge do exist. *Fieldcrest Dairies v. City of Chicago,* 27 F. Supp. 258. It is inconceivable that a sane and reasonable mind could believe that this Court during the course of this trial would meet in a public

facility with a self-admitted prostitute who was a total stranger and make such expressions as she has sworn to. Surely a judge of the United States of America cannot be prevented by such patent perjury from performing his duty in accordance with the law. Certainly this United States Judge, by such attempted defamation, will neither be deterred from doing his duty in accordance with the law, nor will he be pressured into doing anything but his duty in accordance with the law. Each defendant will continue to receive every right accorded him under the law.

As stated in the case of *In re Union Leader Corp.* (C. C. A. 1, 1951), 292 F. 2d 381, cert. den. 368 U. S. 927:

> "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. See *Tucker v. Kerner*, 7 Cir. 1950, 186 F. 2d 79, 85; Sanders v. Allen, D. C. S. C. Cal. 1944, 58 F. Supp 417, 420, appeal dismissed, 9 Cir. 1945, 152 F. 2d 534."

The Motion to disqualify filed on behalf of each defendant will be overruled and the motion to strike the same sustained.

An order will enter accordingly.

Frank W. Wilson,
United States Judge.

APPENDIX D.

Opinion—Filed Nov. 12, 1965.

The defendants were indicted under the Federal Obstruction of Justice Statute (18 U. S. C. 1503) upon May 9, 1963, and charged with willfully endeavoring to influence, intimidate, and impede jurors in the discharge of their duties. After lengthy proceedings including two petitions by the defendants to the Court of Appeals for mandamus, each of which petitions was denied, the case went to trial upon January 20, 1964. After seven weeks of trial, the jury returned a verdict of guilty against the defendants, Hoffa, Parks, Campbell and King, and acquitted two other co-defendants.

The case is now before this Court upon the defendants' motion for new trial, the present motion, based upon alleged newly discovered evidence, having been filed upon September 1, 1965. This is the third motion for new trial filed by the defendants, and the second motion based upon alleged newly discovered evidence. The original motion for new trial, asserting 92 grounds, was filed upon March 10, 1964. This motion was overruled by opinion of the Court filed April 8, 1964, and at the time that it was set for argument in the Court of Appeals, the defendants filed their second motion for new trial, this motion being based upon alleged newly discovered evidence. This second motion was initially filed in the Court of Appeals and a stay sought in the original appeal pending its disposition, but the stay was denied. This Court overruled the second motion for new trial by an opinion filed April 8, 1965, and the appeal is presently pending in the Court of Appeals. In the meantime, the Court of Appeals affirmed the conviction of the defendants upon the initial appeal upon July 29, 1965. Shortly thereafter the defendants

filed the present motion for new trial upon September 1, 1965, being the third such motion filed and the second motion to be based upon alleged newly discovered evidence.

Along with the present motion for new trial, the defendants filed a motion seeking to disqualify the undersigned as the presiding judge and alleging bias at the time of the trial as the grounds therefor. This Court overruled the motion to disqualify for the reasons set forth in the opinion filed September 22, 1965. The defendants have now filed a further motion to disqualify the undersigned as the presiding judge and a motion to stay the entry of an order upon the former motion for disqualification pending reconsideration of the initial motion to disqualify.

Taking up the defendants' motion to reconsider the former motion for disqualification, the Court is of the opinion that this motion should be overruled. The motion to reconsider raises no matters that were not fully covered in the opinion of this Court filed September 22, 1965.

Considering next the defendants' motion for disqualification filed September 27, 1965, this motion does not purport to be based upon alleged bias, nor to be brought in accordance with 28 U. S. C., Sec. 144, but contends rather that by reason of the allegations of bias in the new trial motion, the undersigned should disqualify himself under 28 U. S. C., Sec. 455, as having an interest in or being a witness to issues of fact raised in the motion for new trial. Thus, by allegations of bias in the motion for new trial, the defendants seek to accomplish what they are not entitled to accomplish upon a motion to disqualify for alleged bias under 28 U. S. C., Sec. 144, the statute specifically providing for the disqualification of a trial judge for alleged bias. Obviously, such an evasion of the law cannot thus be accomplished, nor can the administration of

justice thus be thwarted. If the defendants could by the mere allegation of bias in the motion for new trial accomplish the removal of a trial judge, when no grounds exist for his disqualification under the statute providing for removal for alleged bias, the defendants could not only evade the law relating to the disqualification of a judge for bias, but could by the simple expedient of including in the motion for new trial allegations of bias against each judge scheduled or designated to hear the motion accomplish the removal of every judge, both trial and appellate, in the federal court system, and thereby prevent any disposition of his motion from ever being made.

Furthermore, an allegation of bias upon the part of a trial judge first asserted in a motion for new trial does not, as a matter of law, assert any ground for new trial nor raise any issue of fact. The issue on a motion for new trial is whether error was committed in the trial of the case. In this case the trial record has now been fully and carefully reviewed by the appellate court and found to be without error. An allegation of bias made after completion of the trial and not reflected in any error made in the trial of the case cannot, as a matter of law constitute a ground for new trial. Thus, an allegation of bias in a motion for new trial raises no issue of fact upon which the trial judge might be called as a witness nor be disqualified under 28 U. S. C., Sec. 455. The defendants' motion for disqualification filed September 27, 1965, will accordingly be overruled.

Turning the attention of the Court next to the motion for new trial, as noted above, this motion purports to be based upon newly discovered evidence and is made in accordance with Rule 33 of the Federal Rules of Criminal Procedure, which permits the filing of such motions within two years after the trial. In view of the fact that this case is now pending upon petition for certiorari to the

United States Supreme Court from the action of the Court of Appeals in affirming the conviction of the defendants, as well as pending in the Court of Appeals upon the defendants' appeal from the action of this Court overruling the second motion for new trial, this Court would be without jurisdiction to grant the motion for new trial except upon remand of the case. However, the trial court does have jurisdiction to hear the motion and determine whether a request for remand should be made, even though the case is pending upon appeal.

The present motion sets forth three principal grounds as the basis for the motion. It is first contended that the defendants have obtained newly discovered evidence of misconduct upon the part of the United States Marshals in their care, custody and contact with the jury during the trial of the case. It is next contended that the defendants have obtained newly discovered evidence of misconduct upon the part of jurors, both before and during the trial of the case. Finally, it is contended that the defendants have obtained newly discovered evidence of bias upon the part of the trial judge alleged to have existed at the time of the trial. As noted above, this latter ground does not as a matter of law constitute a ground for new trial, so that it need not further be considered. Much that was said by the Court in its opinion upon the motion to disqualify would be relevant here, however, including the lack of any showing of diligence upon the part of the defendants.

The allegations of misconduct made against the marshals and jurors, generally stated, are that the marshals provided and the jurors used the services of prostitutes during the trial, that the jurors were improperly provided with alcoholic beverages and other favors during the trial, and that improper communications and statements of prejudice against or guilt on the part of the defendant Hoffa were made to and by the jurors both before and

during the trial. The defendants seek to support these allegations of misconduct upon the part of the marshals and jurors by the affidavits of four women who identified themselves as prostitutes, two men who identify themselves as procurers, and six men who identify themselves as employees at the plant where two jurors work. The remaining affidavits filed by the defendants are those of the defendant Hoffa, one of his assistants, and two of his attorneys. These affidavits relate to when and how the affidavits of the prostitutes, the procurers and the fellow employees were obtained. Thus, the alleged newly discovered evidence proffered by the defendants does not relate to the guilt or innocence of the defendants, but rather purports to show that the trial was at the hands of immoral and prejudiced persons, and not good and lawful men and women jurors.

In response to the defendants' motion, the Government has filed a large number of affidavits, including the affidavits of eleven of the twelve trial jurors (one juror being presently critically ill), each of the four alternate jurors, the marshal and each of the deputy marshals who assisted in the care and custody of the jury during the trial or had any contact with the jury. These affidavits specifically and categorically deny each and every act of alleged misconduct, deny any knowlege of or contact with any prostitute, deny the presence of any unauthorized person in the quarters where the jury was sequestered or any communication with any such persons, deny any statements prejudicial to the defendant either made by any juror or in the presence of any juror at any time and deny that any juror had formed or expressed any opinion prejudicial to the defendant prior to the deliberations of the jury.

Upon the basis of the allegations in their motion and supporting affidavits, these defendants seek to be permitted to produce and examine witnesses. It appears,

however, that the motion can properly be decided upon the present record, and this for two reasons. In the first place, it appears conclusively on the face of the record that the defendants' motion is legally insufficient to warrant the granting of a new trial. The law is clear that to support a motion for new trial on the ground of newly discovered evidence, the evidence must not only be newly discovered, but it must be made to appear that the failure to discover it sooner was not due to a lack of due diligence upon the part of the defendants. *Pitts v. United States,* 263 F. 2d 808 (C. A. Alaska, 1959), cert. denied 360 U. S. 919, rehearing denied 361 U. S. 857; *Fernandez v. United States,* 329 F. 2d 899, 904 (C. A. 9), cert. denied 379 U. S. 832; *Ferina v. United States,* 302 F. 2d 95, 112-114 (C. A. 8), cert. denied, *sub nom. Cardarella v. United States,* 371 U. S. 819; *Mills v. United States,* 281 F. 2d 736, 739 (C. A. 4); *United States v. Costello,* 255 F. 2d 876, 879-881 (C. A. 2), cert. denied, 357 U. S. 937. Not only were many of the allegations of misconduct now asserted to be newly discovered raised by the defendants in their original motion for new trial, but there is a total lack of showing of any facts upon which diligence might be inferred.

In their original motion for new trial, the defendants alleged misconduct upon the part of marshals and jurors of much the same nature as is now alleged. The action of this Court in finding such charges in the original motion wholly without merit has now been affirmed by the Court of Appeals. Furthermore, from the record upon that motion it appeared that bellboys were offered or received large sums of money to give affidavits charging misconduct upon the part of marshals and jurors. Also at that time one lady juror was charged with making statements in Chattanooga, Tennessee, with reference to jury misconduct at a time when she was in fact in the State of Florida.

With regard to diligence, the present record is totally devoid of any showing that the evidence now presented as newly discovered could not have been discovered and produced at any time the defendants chose to do so. From the defendants' own affidavits, it appears that O'Brien, an assistant to defendant Hoffa, came to Chattanooga immediately after the Court of Appeals had affirmed the conviction of the defendants and within a matter of a few days had located and taken to the defendants' attorneys the four prostitutes, the two procurers, and the six employees whose affidavits are now alleged to constitute newly discovered evidence of misconduct upon the part of the marshals and jurors. Although the affidavit of the defendant Hoffa and one of his attorneys indicates that each heard "rumors" of jury misconduct at the time the verdict was returned, there is no allegation that they ever attempted to contact the present witnesses until 17 months after the trial and until the Court of Appeals had affirmed the convictions. There is likewise no explanation of how they were able to find the witnesses so promptly after the conviction was affirmed. The Court can only conclude that the diligence displayed by the defendant Hoffa's assistant, O'Brien, immediately after the convictions were affirmed could have located and produced the same witnesses at any earlier time that the defendants may have chosen to send O'Brien to Chattanooga for that purpose.

Wholly aside from whether the present motion alleges any "newly discovered evidence" or whether due diligence is shown in procuring such evidence, the Court can and will however decide the factual issues raised by the present motion for new trial on the basis of the affidavits and counter-affidavits filed herein. The law is well settled that a motion for new trial based upon newly discovered evidence may be decided by the Court upon the affidavits and counter-affidavits filed in support and opposition to the motion. *United States v. Johnson*, 327 U. S. 106; *United*

States v. Astore, 309 F. 2d 144 (C. A. 2); *Lyles v. United States*, 272 F. 2d 910 (C. A. 5); *Stern v. United States*, 260 F. 2d 365 (C. A. 6); *United States v. Troche*, 213 F. 2d 401 (C. A. 2); *Ewing v. United States*, 135 F. 2d 633 (C. A., D. C.), cert. denied 318 U. S. 776; *Hillman v. United States*, 192 F. 264 (C. A. 9), cert. denied 225 U. S. 699; *United States v. Crowder*, ... F. 2d ... (C. A. 6, #15,584, Sept. 30, 1965).

Accordingly, upon the basis of the affidavits and counter-affidavits filed with regard to the present motion for new trial, the Court makes the following findings of fact:

(1) That no juror nor alternate juror who participated in the trial of this case was at any time furnished a prostitute by any United States Marshal or Deputy United States Marshal, nor did any juror at any time during the trial of this case have any contact with or engage in any conversation with any prostitute, including Patsy Jo Harris, Catherine Johnson, Troyce Dean Henry, Bobbie Ann Sells and Marie Monday.

(2) That no United States Marshal or Deputy United States Marshal at any time during the trial of this case made any remark prejudicial to the defendant to or in the presence of any juror.

(3) That no United States Marshal nor Deputy United States Marshal provided any juror with alcoholic beverages or bestowed other gifts or favors upon any juror, nor did anything calculated to influence the decision of the case by the jury either in favor of or against any party in the case.

(4) That no unauthorized separation of the jury occurred during the trial of the case and that at no time during the trial of this case was any juror out of the presence of a United States Marshal or Deputy United States Marshal duly sworn to have custody of the said jury.

(5) That no juror at any time prior to the case being submitted to the jury for decision discussed the evidence in this case with anyone or expressed any opinion as to the guilt or innocence of any defendant, nor did any juror make any comment or express any prejudice against any defendant in the case prior to the rendition of the verdict, nor was any statement or comment prejudicial to any defendant made by any third party to or in the presence of any juror during the trial of the case.

(6) That neither jurors Starnes, McConnell, nor Kilgore expressed any prejudice against or opinion as to the guilt or innocence of any defendant in this case prior to being selected upon the jury, nor did any such juror fail to fully and truthfully respond upon his respective voir dire examination.

(7) That the United States Marshals and Deputy United States Marshals at all times while in attendance upon the jury and each juror at all times during the course of his or her jury services conducted himself or herself in accordance with the instructions of the Court, which instructions were given in open court and the same appear of record in the trial of the case.

The foregoing findings of fact are based upon and supported by the unequivocal and categorical affidavits of each of the fifteen jurors and the affidavits of each and every United States Marshal or Deputy United States Marshal who had any custody of or contact with any juror during the trial of this case. They are not refuted by the signatures upon the affidavits of four women who admit selling their bodies, if not their signatures, for immoral purposes for $20.00. Neither are they refuted by the affidavits of two procurers for prostitutes who do not purport to identify any juror as having engaged in any misconduct. Neither are they refuted by the affidavits of fellow employees of two jurors who identify themselves

as union sympathizers and believe such jurors to be hostile to unions. In this regard, the Court cannot overlook the fact that immediately after the employee, Isenhower, gave an affidavit to the defendants, which was represented as being freely and voluntarily given, accusing the juror Kilgore of perjury on his voir dire, the same employee Isenhower, invited the said juror to a social affair at which alleged statements of jury misconduct were made by the juror, which alleged statements form the basis of the affidavits promptly filed with the defendants by the employees, Isenhower, Horton and Bull. Such diligence, if not deviousness, in producing evidence would hardly be attributed to a witness who claims to be totally disinterested.

For the reasons hereinabove set forth, the Court is of the opinion that the defendants' motion for new trial is without merit. No request for remand of the case will be made. An order will enter accordingly. Likewise, in accordance with this opinion and in accordance with the opinion of the Court entered upon September 22, 1965, orders will enter overruling both motions of the defendants to disqualify the undersigned as the trial judge in this case and overruling the defendants' motion to stay entry of an order accordingly.

Enter:

Frank W. Wilson,
United States District Judge.

APPENDIX E.

(Filed Sep. 14, 1967, Carl W. Reuss, Clerk.)

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
James R. Hoffa,
Defendant-Appellant.
No. 16,991.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $ . . .

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
Thomas Ewing Parks,
Defendant-Appellant.
No. 16,992.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $ . . .

A True Copy.
Attest:
.....
Carl W. Reuss, Clerk.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,

vs.

Larry Campbell,
Defendant-Appellant.

No. 16,993.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $. . . .

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
Ewing King,
Defendant-Appellant.
No. 16,994.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $ . . .

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk.